STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 26, 2003
v	No. 236040 Wayne Circuit Court
DION A. ANDERSON, Defendant-Appellant.	LC No. 99-012508-01

Before: Owens, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317, assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was subsequently sentenced to serve concurrent terms of twenty to thirty and two to ten years' imprisonment for his convictions of murder and assault, to be preceded by the mandatory two-year term for felony firearm. Defendant appeals as of right, seeking a new trial or remand for additional evidentiary proceedings. Finding an insufficient basis to support either request, we affirm defendant's convictions.

This case arises from a shooting in which two persons were injured, one fatally. Before trial, defendant moved to suppress his statements confessing to the shooting, claiming that he was coerced or otherwise tricked into signing the statements, which he asserted were fabricated by the interrogating officers. During the hearing on this motion defendant testified that after initially denying any involvement in the shooting when speaking with Officer Lonze Reynolds on the morning of November 23, 1999, he was asked to take a polygraph examination.[1] After being told that he would be released if he passed the examination, defendant agreed to take an examination to be administered by Officer Andrew Sims. Upon completing the examination, defendant was told by Sims that he had failed the polygraph and was, therefore, considered by

[1] Defendant has not provided this Court with a complete transcript of the suppression hearing, but rather only excerpts consisting of his own testimony and that of the interrogating officers. It is apparent, however, that the trial court denied the motion to suppress, as evidenced by admission of the challenged statements into evidence at trial.

Sims to be "guilty." According to defendant, Sims then told him that if he did not confess to the shootings Sims would make certain that defendant never saw his children again, after which Sims wrote "something" down on a piece of paper and told defendant to sign it. When defendant protested, Sims began yelling at him and defendant signed the paper out of fear. When defendant saw Reynolds afterward, he told Reynolds that Sims made him sign something that he did not want to sign. Reynolds, however, did not seem to care.

On cross-examination, defendant specifically denied writing or signing the handwritten statement indicating that he shot "Mike" after seeing him while walking up the street. Defendant claimed this statement was in fact written by Sims, who signed defendant's name after writing the statement. However, defendant acknowledged his signature on the second statement given to Reynolds later that day, but denied ever making any of the admissions contained in that statement.[2]

On appeal, defendant asserts that, given these allegations, his trial counsel was ineffective for failing to obtain the opinion of a handwriting expert regarding the authenticity of the handwritten statement alleged by the police to have been written and signed by defendant immediately after taking the polygraph examination.[3] We disagree.

To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and that the representation was so prejudicial that he was deprived of a fair trial. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). To demonstrate such prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. *Id*. at 600. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Here, even assuming that it was unreasonable for counsel not to obtain the opinion of a handwriting expert, defendant cannot show that he was prejudiced by this failure. A factfinder is not bound to accept the opinion of an expert witness. *People v Clark*, 172 Mich App 1, 9; 432 NW2d 173 (1988). Moreover, the subject opinion would only directly address the authenticity of the handwritten statement, without challenging defendant's oral statements, as testified to by

[2] In response to defendant's assertions, Officers Sims and Reynolds testified to the events of November 23, 1999, offering essentially the same detail and sequence of events ultimately offered at trial. In sum, the officers denied fabricating or otherwise tricking defendant into making the subject statements, which they indicated were written or signed by defendant knowingly and willingly after being told that he failed the polygraph examination relating to his involvement in the shootings.

[3] In support of this assertion defendant has appended to his brief a letter, authored by a forensic document examiner, indicating the examiner's "qualified opinion" following review of a photocopy of the statement that the statement was not written by defendant. However, because this Court is limited on appeal to reviewing only the lower court record, MCR 7.210(A)(1), this newly presented information is not properly before us. See also *People v Williams*, 241 Mich App 519, 524 n 1; 616 NW2d 710 (2000) (a party may not enlarge the record on appeal).

both Sims and Reynolds, as well as the more detailed second written statement, which defendant acknowledged signing and does not challenge on appeal. Given these facts, defendant cannot show to a reasonable probability that the absence of opinion testimony concerning the authenticity of the handwritten statement affected the outcome of the trial. *Carbin*, *supra*.

Defendant also argues that his trial counsel was ineffective for failing to move to suppress defendant's inculpatory statements as the fruit of an illegal arrest and unreasonable delay in arraignment. Again, we disagree.

A police officer may arrest an individual for a felony offense without a warrant provided that a felony offense has been committed and the officer has probable cause to believe that the defendant committed it. MCL 764.15(c); *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). In reviewing a challenged finding of probable cause, the reviewing court must determine whether the facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected person had committed a felony. *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998). In this case, there is no dispute that a felony offense was committed. Thus, this Court is concerned only with the question whether there was probable cause to believe that defendant committed the offense.

With respect to his arrest, defendant contends that he was arrested for investigative purposes without probable cause, "an illegal police practice long condemned by the United States Supreme Court and the appellate courts of this state." *Id*. at 633; see also *Brown v Illinois*, 422 US 590; 95 S Ct 2254; 45 L Ed 2d 416 (1975). Specifically, defendant argues that at the time of his arrest the police were acting on mere speculation and rumor regarding the identity of the individual responsible for the shooting. However, even if we assume (without deciding) that the facts possessed by the arresting officers at the time of the arrest were insufficient to support a finding of probable cause to arrest defendant in connection with the shooting, "[t]he mere fact of an illegal arrest 'does not per se require the suppression of a subsequent confession.'" *Kelly*, *supra* at 634, quoting *People v Washington*, 99 Mich App 330, 334; 297 NW2d 915 (1980). An inculpatory statement must be suppressed under the exclusionary rule only if the unlawful seizure was used to directly procure the statement. *Kelly*, *supra* at 634-635; see also *Wong Sun v United States*, 371 US 471, 487-488; 83 S Ct 407; 9 L Ed 2d 441 (1963). Intervening circumstances can break the causal connection between the illegal arrest and inculpatory statements, thereby purging the primary taint so that the defendant's confession is properly admissible. *Kelly*, *supra* at 634-635. Here, despite the facts available to the arresting officers when they entered the store to effectuate defendant's arrest in connection with the shooting, defendant was properly arrested for carrying a concealed weapon after voluntarily removing a handgun from his waistband and placing it on the counter in plain view of the officers. Accordingly, even accepting defendant's claim that his arrest for questioning in relation to the shooting would have been improper, there was a sufficient intervening circumstance to attenuate the taint of any illegality pertaining to that arrest. Consequently, no proper basis for suppression of the subject statements on the ground that defendant's arrest was unlawful having existed, counsel was not ineffective in failing to seek suppression on that ground. See *People v Rodgers*,

248 Mich App 702, 715; 645 NW2d 294 (2001) (defense counsel is not ineffective for failing to make a futile argument).[4]

We similarly reject defendant's claim that his trial counsel was ineffective for failing to seek suppression of defendant's statements on the ground that they were obtained as a result of an unreasonable delay between defendant's arrest and arraignment. Because this issue was not raised below, the exact time between defendant's arrest and his arraignment is not apparent from the record. The record does, however, indicate that defendant was arrested on November 22, 1999, at approximately 8:30 p.m., and was not arraigned until some time on November 26, 1999, more than three days later. Because a delay of more than forty-eight hours between arrest and arraignment is presumptively unreasonable, see *Riverside Co v McLaughlin*, 500 US 44, 56-57; 111 S Ct 1661; 114 L Ed 2d 49 (1991), defendant's claim that his Fourth Amendment right to a judicial determination of probable cause to justify his detention is not without merit. See *Gerstein v Pugh*, 420 US 103, 113-114; 95 S Ct 854; 43 L Ed 2d 54 (1975). However, an unreasonable delay between arrest and arraignment, standing alone, does not necessarily require the suppression of statements obtained while a person is in police custody during the delay. Rather, the proper analysis is whether the person's statement was obtained voluntarily, as determined by the factors listed in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).[5] Unreasonable delay before arraignment is but one such factor. See *People v Manning*, 243 Mich App 615, 643; 624 NW2d 746 (2000). Also relevant to the analysis are:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bring him before a magistrate before he gave his confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Cipriano*, *supra* at 334.]

Considering these factors, we find that defendant's statements were voluntarily given and that, therefore, suppression was not warranted despite the delay in having him arraigned. First, the record indicates that before making either inculpatory statement, the twenty-three-year-old

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[4] In reaching this conclusion, we recognize that defendant's arrest for carrying a concealed weapon was arguably a direct result of the allegedly improper seizure for questioning concerning the shootings. However, such a "but for" test for exclusion has been specifically rejected in favor of a determination regarding whether the challenged evidence resulted from an exploitation of the primary illegality or, instead, by means sufficiently distinguishable to purge the primary taint. See *Wong Sun*, *supra*.

[5] We note that while defendant denied ever making the subject statements, the question whether a statement was in fact made is separate from the voluntariness issue. *People v Neal*, 182 Mich App 368, 371; 451 NW2d 639 (1990).

defendant was given and indicated an understanding of his *Miranda*[6] rights. Second, the record does not indicate that defendant was uneducated, illiterate or unintelligent. To the contrary, defendant indicated that he could read and write and that he had completed a twelfth grade education. Third, there is no indication that defendant was either ill or physically abused or threatened during either interrogation. Fourth, although defendant told Officer Sims that he had recently smoked marijuana, there is no evidence that he was under the influence of that drug, or any other, at the time he made either statement. Fifth, although defendant testified at the suppression hearing that he had "slept poorly" the night before, there was no indication that defendant had been deprived of food, water or sleep before making his statement. Finally, defendant made his first inculpatory statement less than twenty-four hours after his arrest and there is no indication that the questioning that resulted in this statement was excessive or otherwise prolonged. Given these facts, we find defendant's statements to have been voluntarily given. Accordingly, because defendant's statements were voluntary, defense counsel was not ineffective for failing to move to suppress those statements on the basis of a delay in arraignment following arrest. *Cipriano*, *supra*; *Rodgers*, *supra*.

Defendant also argues that his counsel was ineffective in failing to seek suppression of his statements under *People v Bender*, 452 Mich 594, 597; 551 NW2d 71 (1996), wherein our Supreme Court held that due process requires the police to inform a suspect that a retained attorney is immediately available to consult with him, and that failure to so inform a defendant before he makes an incriminating statement per se precludes a knowing and voluntary waiver of the rights to remain silent and to have counsel present during questioning. However, the facts of the present case distinguish it from *Bender*.

In support of his assertion, defendant has appended to his brief what purports to be a police "case progress report," which indicates that several hours before defendant made his first incriminating statement, defendant's father's attorney called the police department to inquire regarding the basis of defendant's detention.[7] However, according to the report, after being informed that defendant was being held on charges of carrying a concealed weapon, the attorney simply replied "okay," then hung up without ever having indicated that he had been retained to represent or wished to speak with defendant. Accordingly, *Bender* does not require suppression of defendant's statement and counsel was not, therefore, ineffective in failing to seek suppression on that ground. *Rodgers*, *supra*.

Defendant also argues that his counsel was ineffective for failing to attempt to rehabilitate alibi witness Joe Anderson after Anderson admitted on cross-examination that he made his first formal statement concerning defendant's alibi only a few days before trial. Specifically, defendant asserts that on redirect examination counsel should have elicited from Anderson an explanation for his delay in coming forth with such relevant information. However, defendant offers no indication of what Anderson's response to such questioning would have

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[6] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[7] Like the opinion letter authored by defendant's forensic document examiner, the case progress report in question is not part of the lower court record; therefore, the report is not properly before this Court. See MCR 7.210(A)(1).

been. Moreover, even assuming that Anderson could have readily and sufficiently explained the delay, the delay was not the sole basis for the trial court's rejection of the alibi defense. Although in rejecting that defense the trial court did comment on Anderson's failure to come forward sooner, it also noted the inconsistencies and contradictions between Anderson's version of events on the night of the shooting and that of defendant's second alibi witness, William Durham. The trial court further relied heavily on its impression of Anderson's overall veracity while testifying, specifically noting his demeanor during questioning on the stand. Given these facts, we do not conclude that counsel's failure to attempt to rehabilitate Anderson impacted the outcome of the trial.[8] Accordingly, defendant has again failed to establish that counsel was ineffective in this regard. *Rodgers*, *supra*.

Defendant next argues that he was denied due process of law when witnesses at the trial committed perjury. We disagree.

Consistent with the Due Process Clause of the federal constitution, US Const, Am XIV, criminal prosecutions must comport with notions of fundamental fairness. See *People v Lester*, 232 Mich App 262, 276-278; 591 NW2d 267 (1998). Thus, the knowing use of false or perjured testimony constitutes a denial of due process if there is any reasonable likelihood that the false testimony could have affected the outcome of the trial. *United States v Bagley*, 473 US 667, 678; 105 S Ct 3375; 87 L Ed 2d 481 (1985); *People v Canter*, 197 Mich App 550, 568; 496 NW2d 336 (1992). In order to establish a denial of due process, however, a defendant must show (1) that the challenged testimony was actually false; (2) that the testimony was material; and (3) that the prosecution or other state representative knew it was false. *United States v O'Dell*, 805 F 2d 637, 641 (CA 6, 1986).

Here, defendant asserts that Officers Sims and Reynolds knowingly testified falsely when stating that defendant confessed to the crimes, both orally and in writing. In support of this claim, defendant points to the opinion of his forensic document examiner, indicating that the handwritten statement offered by the prosecution at trial was not written by defendant. However, in order to establish that testimony was falsely given, it is not enough to simply show that the subject testimony has been challenged by another witness. See *United States v Brown*, 634 F 2d 819, 827 (CA 5, 1981); see also *Lester*, *supra* at 277-278 (finding no violation of due process where proofs did not "conclusively establish" that government witness' testimony was perjured). Moreover, as previously noted, a trier of fact is not bound to accept the opinion of an expert witness. *Clark*, *supra*. Thus, even considering the document examiner's opinion, defendant has failed to demonstrate anything more than the fact that the officers' testimony could be contradicted by that of another witness. Such a showing relates to credibility and is insufficient to establish that the challenged testimony was perjured. *Brown*, *supra*; see also *People v Lemmon*, 456 Mich 625, 642-644; 576 NW2d 129 (1998). The challenged testimony does not contradict indisputable physical facts or laws, nor was it so inherently implausible that it could

[8] In reaching this conclusion, we note that Anderson's claim of events was also contradictory to those claimed by defendant in his initial exculpatory statement to police, the authenticity of which defendant has never challenged. Indeed, defendant failed in this statement to even identify Joe Anderson as being present at his home on the night of the shootings.

not be accepted by a reasonable trier of fact. *Lemmon*, *supra* at 643-644. Consequently, defendant has failed to demonstrate a denial of due process on the basis of false testimony given at trial. *O'Dell*, *supra*.

Citing the opinion of his forensic document examiner, defendant next asserts that he is entitled to a new trial because of newly discovered evidence. Again, we disagree. In order to merit a new trial on the basis of newly discovered evidence, a defendant must demonstrate that "(1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial." *Lester*, *supra* at 271. As argued by the prosecutor, defendant is unable to meet these criteria. Clearly, the subject evidence could have been discovered and produced at trial. Moreover, the document examiner's opinion is merely cumulative to defendant's denial of having written the first inculpatory statement. Therefore, defendant is not entitled to relief on this basis. *Id*.

Defendant next argues that the trial court erred in rejecting his alibi defense. Defendant first asserts that the trial court incorrectly applied the law pertaining to this defense. Specifically, defendant argues that the trial court improperly shifted the burden of proof by looking to the alibi witnesses to convince it that defendant was elsewhere at the time of the shooting. However, as noted by the Court in *People v Marvill*, 236 Mich 595, 597-598; 211 NW 23 (1926), testimony in support of an alibi defense is simply a means of disproving an essential factor of the prosecution's case by raising reasonable doubt as to the sufficiency of the proofs connecting an accused with the crime. Thus, it is true that at all times during trial it remained the prosecution's burden to establish defendant's presence at the scene of the shooting beyond a reasonable doubt. *Id*. at 598. However, the mere fact that the trial court looked at the alibi witnesses as part of its determination whether the prosecution had proved this factor beyond a reasonable doubt does not amount to an impermissible shifting of the burden of proof.

We similarly reject defendant's assertion that the trial court failed to consider the testimony of defendant's alibi witnesses with an open mind, having indicated that it "thought about" the case prior to the conclusion of proofs. Contrary to defendant's assertion, at the time the trial court made this statement the proofs, as well as the parties' arguments, were complete. In any event, defendant cites no authority indicating that a trial court sitting as the trier of fact may not properly reflect upon the evidence before it prior to the close of all proofs.

Defendant next argues that the trial court erred in rejecting his alibi defense on the basis that, given the sequence of events claimed by defendant in his exculpatory statement, defendant had the opportunity to commit the charged crimes after dropping his uncle off at the store. In doing so, defendant appears to argue that the time frame given by defendant in this statement would have placed defendant at home at the time of the shootings. The trial court, however, was not bound to accept defendant's exculpatory statement in total. See CJI2d 3.6(1). Indeed, it is not inconceivable that in attempting to exculpate himself defendant would shift the time frame of events to comport with his claim that he was home at the time the shootings occurred. Accordingly, the trial court could properly conclude that defendant shot the victims sometime after dropping his uncle off at the store, regardless of the time frame of events claimed by defendant or, for that matter, his alibi witnesses. Consequently, defendant has failed to show the

clear error necessary to successfully challenge the trial court's finding in this regard. See MCR 2.613(C).

Finally, defendant argues that the trial court's failure to ascertain on the record whether defendant knowingly and intelligently waived his right to testify requires a new trial. We disagree. In *People v Simmons*, 140 Mich App 681, 684; 364 NW2d 783 (1985), this Court held that there is no requirement in Michigan that there be an on-the-record waiver of a defendant's right to testify. Accordingly, defendant is again entitled to no relief on this claimed error.

We affirm.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Christopher M. Murray